

# Stabilizing Democracy and Human Rights Systems in South Korea

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## I. INTRODUCTION

Democracy is defined as “a system of government by the whole population or all the eligible members of a state, typically through elected representatives.”<sup>1</sup> Under this definition, South Korea is certainly considered a democratic country, and one may have little hesitation in praising the country as one of the few exemplary Asian states that have achieved both remarkable economic development and dramatic political democratization within a relatively short period of time.<sup>2</sup> South Korea's economy in the last half century has jumped from being one of Asia's poorest to one of the region's leading developed countries.<sup>3</sup> The notorious South Korean authoritarian military regimes gave way to democratic regimes during the 1980s and 1990s. These changes toward democracy and a human rights protection system in the country were strongly supported by the growth of civil society networks and people power movements.

However, it is ironic to see Park Geun-hye, the daughter of former dictator Park Chung-hee, win the most recent South Korean presidential election in 2012.<sup>4</sup> Park won the election as an icon of the conservative

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<sup>1</sup> *Democracy Definition*, OXFORD DICTIONARY, [http://oxforddictionaries.com/us/definition/american\\_english/democracy?q=democracy](http://oxforddictionaries.com/us/definition/american_english/democracy?q=democracy) (last visited May 17, 2013).

<sup>2</sup> Southeast Asian states under the roof of ASEAN (“Association of Southeast Asian Nations”) are following South Korea's path in achieving both economic prosperity and political democratization.

<sup>3</sup> *What Do You Do When You Reach the Top?*, ECONOMIST (Nov. 12, 2011), <http://www.economist.com/node/21538104>. [BB 16.6(f)].

<sup>4</sup> See Shin Seung-keun, *Park Geun-hye elected president of South Korea*, THE

ruling *Saenuri* party (New World Party), garnering the support of 51.55% of the population.<sup>5</sup> In spite of her familial relationship with the former dictator, few people believe that she would be able to change Korean democracy into a dictatorship. However, Park is not free from her father's legacy. She considers the economic growth and anti-communism policies of her father as an essential part of her political identity. She has even tried to defend her father's leadership by saying that "he made the best choice in an unavoidable situation,"<sup>6</sup> a statement which has been met with strong criticism from the general public.<sup>7</sup>

At this stage, it seems worthwhile for us to ask whether democracy and human rights systems are soundly rooted in South Korean society. This inquiry is particularly relevant because of the criticisms surrounding the authoritarian governing style of Park's predecessor, former president Lee Myung-bak.<sup>8</sup> Is the human rights system in South Korea really sound? Can we be assured that South Korean democracy and human rights systems will continue in their development as they have in the last couple of decades?

Professor Louis Henkin stated that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>9</sup> In fact, there are many challenges for a country to apply and implement international norms and standards in domestic settings. External values and concepts are sometimes viewed as appealing, but the actual transplantation of foreign norms into domestic legal soil is not free from resistance. We often see tension between international norms and local norms, and some of the imported norms may become discarded. The development of norms and values in a country is not free from its internal dynamic process, and the external or supra-national values could be domesticated only when they pass through this filtering process. There is

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HANGYEOREH (Dec 20, 2012), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/566277.html](http://www.hani.co.kr/arti/english_edition/e_national/566277.html).

<sup>5</sup> *Id.*

<sup>6</sup> Park Geun-Hye said during a debate organized by a journalists' association, "I think my deceased father made the best choice in an unavoidable situation." She stressed that her father laid the foundation of South Korea's rise from the ashes of the 1950-53 Korean War to become Asia's fourth largest economy. *See Park Geun-hye defends her father's 1961 military coup*, YONHAP NEWS AGENCY (Jul. 16, 2012), <http://english.yonhapnews.co.kr/topics/2012/07/16/84/4604000000AEN20120716006800315F.HTML>.

<sup>7</sup> Seong Yeong-cheol and Seok Jin-whan, *Park Defends Her Father's Coup as "the Best Possible Choice,"* THE HANGYOREH (Jul 18, 2012), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/543077.html](http://www.hani.co.kr/arti/english_edition/e_national/543077.html).

<sup>8</sup> Ko Na-mu, *Abuse of Authoritarian-era Law Rife Under Lee Administration, Says DLP Chairwoman*, THE HANGYOREH (Mar. 1, 2011), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/465868.html](http://www.hani.co.kr/arti/english_edition/e_national/465868.html).

<sup>9</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2nd ed. 1968).

something that has to happen within the country where new values and norms are introduced and adopted. It is important to understand the peculiarities and the particularities that develop in this value adoption process.<sup>10</sup>

The development of democracy and human rights systems in South Korea is an excellent example of how international norms and values are taking root in domestic soil.<sup>11</sup> South Korea's democracy, rule of law, constitutionalism, and the enhanced protection of human rights demonstrate that the domestic filtering mechanisms for norm adoption are functioning fairly well.

In terms of the adoption of international human rights norms, South Korea has ratified most of the major human rights treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"),<sup>12</sup> the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>13</sup> the Convention on the Rights of the Child ("CRC"),<sup>14</sup> and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").<sup>15</sup> However, the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ("CMW") has yet to happen,<sup>16</sup> as multiculturalism in Korea is in its early developmental stages.<sup>17</sup> Similarly

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<sup>10</sup> See TAE-UNG BAIK, *EMERGING REGIONAL HUMAN RIGHTS SYSTEMS IN ASIA* 59-68 (2012).

<sup>11</sup> For a general discussion on filtered universalism, see *id.*

<sup>12</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter *ICCPR*]; see *International Convention on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited May 28, 2013).

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*]. South Korea ratified it on Apr. 10, 1990. See *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en) (last visited May 27, 2013).

<sup>14</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter *CRC*].

<sup>15</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW*]. South Korea ratified it on Dec. 27, 1984. See *Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec) (last visited May, 27, 2013).

<sup>16</sup> See *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNITED NATIONS TREATY SERIES, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-13&chapter=4&lang=en) (last visited May 27, 2013).

<sup>17</sup> Kim Young-won, *Korean Society Struggles to Embrace Multiculturalism*, JAKARTA POST (Jan 19, 2012), <http://www.thejakartapost.com/news/2012/06/19/korean-society->

Korea's accession to the Second Optional Protocol to ICCPR on death penalty abolition is not likely to occur in the near future because of the struggle between death penalty supporters and critics that is going on in Korea. Human rights systems in South Korea develop with the country's own characteristics. Human rights principles are not adopted as a replica of foreign experience, but they develop through responding to the challenges as they are faced.

This article argues that South Korea is consolidating its democracy and human rights systems with its own strengths and weaknesses, and that the human rights norms in Korea are developing through their own filtering mechanisms, which still need continuous attention. Following this introduction, Part II discusses the historical development of human rights systems in Korea. Part III analyzes the current stage of political democratization by reviewing political changes and Korean constitutional jurisprudence. Part IV reviews the growing demands for economic democracy and the on-going tension between conservatives and progressives. Part V assesses the dynamics of social changes by discussing the efforts to abolish the death penalty along with the resistance from the retentionist camps, which lead to a conclusion that South Korea still needs to put forth greater efforts to consolidate democracy and human rights.

## II. THE DEVELOPMENT OF HUMAN RIGHTS SYSTEMS IN SOUTH KOREA

The history of constitutional documents on the Korean peninsula may date back to either the *Gyunggukdaejeon* from the Chosun Dynasty or the *Taehankukje* that was adopted in 1899 under the Korean Empire, in the last days of Chosun.<sup>18</sup> After the liberation in 1945, Korea was divided into two, the North and the South. While North Korea became a socialist state, South Korea adopted a rather liberal constitution, influenced by the German Weimar Constitution.<sup>19</sup> However, for a long time, the rights established by this constitution were rendered meaningless by dictatorial regimes.<sup>20</sup> Law

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struggles-embrace-multiculturalism.html.

<sup>18</sup> *Taehankukje* was the constitutional document to set up a constitutional monarchy at the end of Chosun dynasty by Emperor Gojong.

<sup>19</sup> BAIK, *supra* note 10, at 118.

<sup>20</sup> The authoritarian regimes generally emphasized national sovereignty, economic development and anti-communism. Thomas P. Kim, *The Second Opening of Korea: U.S.-South Korean Free Trade Agreement*, KOREA POLICY INSTITUTE (Jun. 14, 2007), <http://www.kpolicy.org/documents/policy/070614thomaskimsecondopening.html>. Therefore, the constitutional rights provisions existed in earlier versions of the constitution, but they were not read seriously as guarantors of the rights of the people. Cf. BAIK, *supra* note 10, at 118 ("The Constitution of 1987 transformed the declaratory constitution, which had only been an ornament under the military dictatorship, into a meaningful document which can be

was a mere tool for the government to justify its illegitimate governance. In 1970, a labor activist named Jeon Tae-Il shouted out, while self-immolating on the street, "Abide by the Labor Standards Laws! We are not machines!"<sup>21</sup> It was the first occasion when the rights sanctioned in the constitution and its accompanying legal statutes were seriously claimed in the process of social movements.<sup>22</sup> After the adoption of the 1987 Constitution, Korea's history of real constitutionalism began. From externally imposed norms, the perception of the constitution changed and it began to be seen as a guarantee of human rights for the Korean people.<sup>23</sup>

When the constitution was first adopted in South Korea in 1948, the expression, "human rights" did not appear.<sup>24</sup> In a year where much of the world was adopting the Universal Declaration of Human Rights,<sup>25</sup> Korea was separate, and not a party to this movement. In contrast, the constitution of Japan has emphasized human rights since its adoption in 1947,<sup>26</sup> boasting its progressive characteristics adopted under the auspices of the US Military Government after WWII.<sup>27</sup> It was only after Korea's 1962 Constitution that the South Korean National Assembly began to use the term "human rights" in the constitution.<sup>28</sup> Article 8 of the 1962 Constitution provided that: "All citizens shall be assured of human dignity and worth and it shall be the duty of the State to guarantee *to the greatest extent* the fundamental human rights of individuals."<sup>29</sup>

The provision still shows some limitations to the protection of human rights by using the expression, "to the greatest extent."<sup>30</sup> This limitation was removed in the 1980 Constitution.<sup>31</sup> Article 9 of the 1980 Constitution

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used to protect rights."). International humanitarian laws such as Geneva Conventions and Hague Conventions were invoked during the Korean War in 1950-53, but they did not contribute much to the development of human rights in South Korea. BAIK, *supra* note 10 at 118-121.

<sup>21</sup> HAGEN KOO, KOREAN WORKERS: THE CULTURE AND POLITICS OF CLASS FORMATION 70 (2001).

<sup>22</sup> *Id.* at 127.

<sup>23</sup> See BAIK, *supra* note 10, at 119-120.

<sup>24</sup> 1948 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (July 17, 1948) (S. Kor.).

<sup>25</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter *UDHR*].

<sup>26</sup> NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION] (Japan).

<sup>27</sup> *Id.* arts. 11 & 97.

<sup>28</sup> 1962 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Dec. 26, 1962) (S. Kor.).

<sup>29</sup> *Id.* art. 8, no. 6 (emphasis added) (translation provided by the author).

<sup>30</sup> *Id.*

<sup>31</sup> Compare 1962 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Dec. 26, 1962) (S. Kor.) with 1980 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Oct. 27,

and Article 10 of current 1987 Constitution states that: "All citizens shall be assured of human dignity and worth and *have the right to pursue happiness*. It shall be the duty of the State *to confirm and guarantee* the fundamental and *inviolable* human rights of individuals."<sup>32</sup> This provision expanded the scope of human rights by acknowledging the right to pursue happiness, and also made it clear that the state bears the duty to confirm the inviolability of human rights. These changes demonstrate that the democracy movements in the 1970s and 1980s were not merely pursuing procedural democracy in the form of the election system, but they also wanted to achieve substantive democracy, which included the agenda of promoting substantive human rights.

When the Jimmy Carter administration campaigned for human rights diplomacy in the 1970s, these policies did not excite human rights activists in Korea.<sup>33</sup> These activists thought that human rights without democracy was insufficient. Their skepticism of this approach to human rights grew, particularly when the Carter administration turned a blind-eye to General Chun Doo-hwan's military coup in 1979-80, and when Chun moved the marine forces from the De-Militarized Zone ("DMZ") to Gwangju to suppress the Gwangju Democracy Movement.<sup>34</sup> Because, at that time, the armed forces were under the direct control of US Commanders, some civil society groups still allege that the U.S. is jointly responsible for the May 1980 massacre in Gwangju.<sup>35</sup> These criticisms increased when Ronald Reagan warmly embraced General Chun, who was specially invited to the White House, soon after Chun assumed presidential power in South Korea.<sup>36</sup>

The introduction of international human rights norms and values in South Korea was largely conducted by the NGOs such as the Lawyers for a

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1980) (S. Kor.).

<sup>32</sup> 1980 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 9 (Oct. 27, 1980) (S. Kor.) (emphasis added) (translation provided by the author).

<sup>33</sup> Cf. Tim Shorrock, *The Struggle for Democracy in South Korea in the 1980s and the Rise of Anti-Americanism*, 8 THIRD WORLD QUARTERLY 1195 (Oct. 1986).

<sup>34</sup> David Adesnik & Sunhyuk Kim, *If at First You Don't Succeed: The Puzzle of South Korea's Democratic Transition*, CENTER ON DEMOCRACY, DEVELOPMENT, AND THE RULE OF LAW, STANFORD (July 2008), available at [http://iis-db.stanford.edu/pubs/22209/No\\_83\\_AdesKimSouthKorea.pdf](http://iis-db.stanford.edu/pubs/22209/No_83_AdesKimSouthKorea.pdf).

<sup>35</sup> Tim Shorrock, *The Kwangju Uprising and US-Sanctioned Massacre*, KASAMA PROJECT (Jun. 17, 2010, 11:00 AM), <http://kasamaproject.org/history/2360-92the-kangju-uprising-and-US-sanctioned-massacre>.

<sup>36</sup> Hamesh McDonald, *Reagan's Backing for Chun Worries Seoul's Dissidents*, SYDNEY MORNING HERALD, Feb. 18, 1981, at 17, available at <http://news.google.com/news/papers?id=1301&dat=19810218&id=5gBkAAAAIAAJ&sjid=9OYDAAAAIAAJ&pg=6794,6197606>.

Democratic Society (*Minbyun*), the People's Solidarity for Participatory Democracy (PSPD), and *Sarangbang* Human Rights Group.<sup>37</sup> Through the civil societies' vigorous activities, human rights became popularly supported in Korea.<sup>38</sup>

A country's human rights norms are found in several forms. One of the most important methods of adopting human rights norms is the ratification of international human rights treaties. Under the South Korean Constitution article 6, "treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea."<sup>39</sup> South Korea has ratified or acceded to seven of the United Nation's nine major human rights treaties, including the *ICCPR*,<sup>40</sup> and the *ICESCR*.<sup>41</sup> The First Optional Protocol to the *ICCPR*, which allows individual communication to the Human Rights Committee, was also ratified.<sup>42</sup> While Korea has ratified seven of these treaties, Japan ratified six and China has ratified five.<sup>43</sup> South Korea's ratio of ratification of human rights treaties is on par with other developed countries in the region.

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<sup>37</sup> LAW AND SOCIETY IN KOREA 132 (Hyunah Yang ed., 2013).

<sup>38</sup> *Id.*

<sup>39</sup> DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 6 (S. Kor.).

<sup>40</sup> *ICCPR*, *supra* note 12.

<sup>41</sup> *ICESCR*, *supra* note 13.

<sup>42</sup> *See infra* Table 1.

<sup>43</sup> *See infra* note 46.

Table 1: Human Rights Treaty Ratification by South Korea as of 2013<sup>44</sup>

State party	ICESCR	ICCPR	OPT1 ICCPR	OPT2 ICCPR	CERD	CEDAW	CAT	CRC	CMW	No. of treaties
	1966/ 1976	1966/ 1976	1966/ 1976	1989/ 1991	1966/ 1969	1979/ 1981	1984/ 1987	1989/ 1990	1990/ 2003	
Republic of Korea	1990	1990	1990		1979	1985	1995	1991		7
Reservations		22				16(1)(g)		21(a), 40(2) (b)(v)		

Interestingly, in South Korea, the ratification of human rights treaties has been closely related to the development of democracy. Five out of the seven ratified treaties were ratified in the 1990s, only after South Korea's democratization.<sup>45</sup>

South Korea still receives criticism for certain reservations it made concerning several provisions of the human rights treaties. South Korea originally declared that Article 14 (5) & (7) on the right to appeal and Article 22 on the right to freedom of association of the ICCPR would not be

<sup>44</sup> ICCPR, *supra* note 12 (ratified by ROK and Japan and signed by China); ICESCR, *supra* note 13 (ratified by China, Japan, and ROK); *Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-5&chapter=4&lang=en) (last visited May 28, 2013) (ratified by ROK and Taiwan but not by China or Japan) [hereinafter *First Optional Protocol of the ICCPR*]; *Second Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-12&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-12&chapter=4&lang=en) (last visited May 28, 2013) (ratified by none); *International Convention on the Elimination of All Types of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-2&chapter=4&lang=en) (last visited May 28, 2013) (ratified by all); CEDAW, *supra* note 15 (ratified by all); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en) (last visited May, 28, 2013) (ratified by all) [hereinafter *CAT*]; *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtmsg\\_no=iv-11&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtmsg_no=iv-11&chapter=4&lang=en) (last visited May 28, 2013) (ratified by all) [hereinafter *CRC*]; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-13&chapter=4&lang=en) (last visited May 28, 2013) (ratified by none).

<sup>45</sup> ICCPR, *supra* note 12; ICESCR, *supra* note 13; *First Optional Protocol of the ICCPR*, *supra* note 44; *CRC*, *supra* note 44; *CAT*, *supra* note 44.



binding over the country.<sup>46</sup> It has withdrawn its reservations on Article 14(5) & (7) concerning the special criminal procedure under Social Protection Act in 2006,<sup>47</sup> but no action has been taken concerning Article 22 on the right to freedom of association because the State Public Officials Act prohibits public servants from participating in trade union activities.<sup>48</sup> With regard to the Convention on the Rights of Child, the government holds reservations about paragraph (a) of Article 21, and sub-paragraph (b) (v) of paragraph 2 of Article 40.<sup>49</sup> Korea declared CEDAW Article 9 and Article 16(1) (c),(d),(f) & (g) not binding concerning women's equal rights.<sup>50</sup> CEDAW had strongly recommended that the reservation of Article

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<sup>46</sup> ICCPR, *supra* note 14.

<sup>47</sup> *Id.*

<sup>48</sup> Article 66, GUKKA GONGMUWEONBEOP [The State Public Officials Act], Act No. 11489, Oct 22, 2012 (S. Kor.); see also *Comments by the Republic of Korea on the concluding observations of the Human Rights Committee: Republic of Korea* (2000), CCPR/C/79/Add.122, available at <http://www.unhchr.ch/tbs/doc.nsf/0/1f3186f9f8a65114802568ef003766a5?Opendocument> (last visited May 28, 2013).

<sup>49</sup> CRC, *supra* note 14, art. 9 § 3 ("States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.").

Article 21 notes that:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary[.]

Article 40 § 2 states:

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law[.]

*Id.*

<sup>50</sup> CEDAW Article 9 § 1 states:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Article 16 § 1 states:

16 is incompatible with the Convention and therefore impermissible.<sup>51</sup> Fortunately, Korea withdrew its reservations on Article 9 & 16(1) (c),(d) & (f), sections related to discrimination,<sup>52</sup> but the reservation on Article 16(1)(g) of CEDAW on the right to choose a family name has not yet been withdrawn.<sup>53</sup>

Since recommendations from human rights bodies concerning state reports or individual communications are not binding, they are often neglected or ignored by the states. The South Korean government is not fully recognizing the recommendations made by the Human Rights Committee on the National Security Act<sup>54</sup> and those of the CEDAW Committee on the discrimination against women,<sup>55</sup> but, as stated above, it is making slow progress in selectively following some of the recommendations.

South Korea was also slow in responding to demands to adopt the National Action Plan for the Protection of Human Rights. Adopting the National Action Plan has become an important obligation of the State after the world endorsed the Vienna Declaration on Human Rights in 1993.<sup>56</sup> South Korea finally began the process of adopting the National Action Plan recommended by its National Human Rights Commission in 2006, and it finally adopted the National Action Plan for 2007-2011 on May 22, 2007.<sup>57</sup>

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1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

*CEDAW*, *supra* note 15.

<sup>51</sup> Comm. On the Elimination of Discrimination Against Women, Rep. on its 18th & 19th Sess., Jan. 19– Feb. 6, 1998 & June 22–July 10, 1998, U.N. Doc. A/53/38/Rev. 1, GAOR, 53d Sess., Supp. No. 38 (1998).

<sup>52</sup> See *CEDAW*, *supra* note 15.

<sup>53</sup> *Id.*

<sup>54</sup> *The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea*, AMNESTY INTERNATIONAL (2012), <http://www.amnesty.org/en/library/asset/ASA25/006/2012/en/d3eb6ce2-ab8c-4479-a012-62744223457e/asa250062012en.pdf>.

<sup>55</sup> See *CEDAW*, UNITED NATIONS TREATY COLLECTION, *supra* note 15.

<sup>56</sup> *National Plans of Action for the Promotion and Protection of Human Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx> (last visited May 28, 2013).

<sup>57</sup> See *Summary of the National Action Plan for the Promotion and Protection of Human Rights of the Republic of Korea*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, [http://www.ohchr.org/Documents/Issues/NHRA/Korea\\_SummaryNHRAP.doc](http://www.ohchr.org/Documents/Issues/NHRA/Korea_SummaryNHRAP.doc) (last visited May 28, 2013).

Another important question is whether the international norms are justiciable in domestic legal systems.<sup>58</sup> South Korean courts are reluctant to prioritize international treaties over domestic law if they are in conflict with local law, and they tend to avoid relying solely on international legal authority.<sup>59</sup> International norms have persuasive influence over Korean society, but justiciability of international law is still in its early development in Korea. Customary international law is treated as part of international law, but its application in domestic court is unlikely when international custom is the only legal source.<sup>60</sup> International norms are generally considered through the constitution or other domestic statutes in Korea.<sup>61</sup>

The U.N. Human Rights Council recently conducted the second universal periodic review on the South Korean human rights situation on October 25, 2012. The Troika Working group<sup>62</sup> of the Human Rights Council (Djibouti, Hungary, and Indonesia), after appreciating the efforts that South Korea has made to enhance human rights protections, recommended a number of measures for a greater protection of human rights, which include:

Enhancing protection against domestic violence and enhancing rehabilitation of victims . . . Protection from discrimination and legal recourse for victims of discrimination and adoption of the Anti-Discrimination Act as a matter of priority; Imposing an official moratorium on the death penalty and strengthening measures against torture and ill-treatment; Amending the National Security Law to prevent its arbitrary application and abusive interpretation; Ensuring the right to conscientious objection to military service and ensuring alternative military service options; Guaranteeing freedom of expression, including on the Internet, and freedom of assembly; Promoting local integration of refugees and asylum seekers and guaranteeing the full enjoyment of human rights of migrant workers . . .<sup>63</sup>

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<sup>58</sup> See Gyeongsu Jeong, *Gukjae Ingweonbeopeui Guknae Jeokyonge Gwanhan Bipanjeok Bunseok: Hangukeui Gukgagwanhaengeul Daesangeuro* [Critical Analysis of the Domestic application of international human rights law: Focusing on the Korean Practice], 8 HANGUK HUNBEOP HAKHOE, Dec. 2002, at 12-14.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., Supreme Court [S. Ct.], 93Do1711, Dec. 24, 1993 (S. Kor.) (deciding on violations of NSA); see also Supreme Court [S. Ct.], 98 Du16620, Jan 26, 1999 (S. Kor.) (deciding on the cancellation of Social Security Supervision measure).

<sup>62</sup> The troikas are a group of three States selected through a drawing of lots who serve as rapporteurs and who are charged with preparing the report of the Working Group on the country review with the involvement of the State under review and assistance from the OHCHR. See *Universal Periodic Review—Media Brief*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Oct. 25, 2002), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights25October2012pm.aspx>.

<sup>63</sup> *Id.*

The tone of the report written by the working group is moderate,<sup>64</sup> but the report demonstrates that some of the South Korean human rights practices are still under scrutiny. Since the conservative party (known as the Grand National Party, or *Hannaradang*, the predecessor of President Park's *Saenuri* Party) candidate Lee Myung-bak's presidency in 2008, the democratic atmosphere in South Korea has encountered serious challenges. Strong concerns have been raised with regard to the freedoms of expression, association and religion.<sup>65</sup> International intellectuals have even warned the government of the possibility of regression from democracy to authoritarianism in Korea.<sup>66</sup> Intelligence agencies resumed monitoring domestic NGOs' activities, thus breaking the new tradition of freedom for civil society organizations under the liberal Kim Dae-jung and Roh Moo-hyun regimes (1998-2007).<sup>67</sup> Civic organizations and individuals were being targeted by the law enforcement agencies for unclear reasons, and former president, Roh Moo-hyun shockingly killed himself by throwing his body down a cliff when allegations of corruption were made against his family members.<sup>68</sup> The Lee government also refused to cooperate with international human rights institutions. For example, Mr. Frank La Rue, the U.N. Special Rapporteur on Freedom of Expression, visited South Korea, but he was not allowed to meet the president. The head of the National Human Rights Commission of Korea also refused to meet the Special Rapporteur.<sup>69</sup> Amnesty International expressed serious concerns on the weakening freedom of expression in Korea after a researcher visited Seoul to report on human rights conditions in 2010.<sup>70</sup>

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<sup>64</sup> Contrast the difference in the reports on North Korea. UN Human Rights Council, *Human Rights Council adopts outcomes of Universal Periodic Review on Bhutan, Dominica and DPRK*, RELIEFWEB (Mar. 18, 2010), <http://reliefweb.int/report/democratic-peoples-republic-korea/human-rights-council-adopts-outcomes-universal-periodic>.

<sup>65</sup> *Freedom on the Net: South Korea*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-net/2012/south-korea> (last visited May 28, 2013).

<sup>66</sup> *South Korea: Statement from Professors in North America Concerned about Korean Democracy*, ASIA HUMAN RIGHTS COMMISSION (June 10, 2009), <http://www.humanrights.asia/news/forwarded-news/AHRC-FS-049-2009>.

<sup>67</sup> *Civic leader objects to NIS's surveillance of civil society*, THE HANKYOREH (June 19, 2009), <http://english.hani.co.kr/arti/english.edition/e-national/361300.html>.

<sup>68</sup> Justin McCurry, *Former South Korea President Leaps to Death in Ravine*, THE GUARDIAN (May 23, 2009), <http://www.guardian.co.uk/world/2009/may/24/south-korea-former-president-suicide>.

<sup>69</sup> See Son Jun-hyun, *U.N. rapporteur reports freedom of expression severely curtailed under Lee administration*, THE HANKYOREH (Feb. 17, 2011), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/463878.html](http://english.hani.co.kr/arti/english_edition/e_national/463878.html).

<sup>70</sup> *South Korea—Amnesty International Report 2010: Human Rights in Republic of Korea*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/region/south-korea/report-2010> (last visited May 28, 2013).

This development has been an unexpected regression, especially since Korean human rights systems have been considered quite strong after the democratization in 1980s and 1990s, particularly under the liberal Kim Dae-Jung and Roh Moo-Hyun governments, which actively promoted human rights. The newly inaugurated Park Geun-hye government may try to differentiate itself from Lee Myong-bak's government, but it is still not very clear whether Korea will go ahead toward the consolidation of democracy and human rights, or whether it will experience some stagnation in human rights protection.

### III. SOUTH KOREA'S POLITICAL CHANGES AND THE GROWTH OF DEMOCRACY

The presidential election campaign in December 2012 was a tight race, and it was a good illustration of the current state of South Korean democracy. Park Geun-hye, the ruling party's candidate was the favorite leading up to the election, but she had two main challengers, Moon Jae-in and Ahn Chul-soo. Moon was the former Secretary General to President Roh Moo-Hyun and the nominee of the main opposition party.<sup>71</sup> Independent candidate Ahn was a professor at Seoul National University and venture businessman, who was widely supported by Korea's younger generation.<sup>72</sup> Both Moon and Ahn's camps, realizing that their chances for winning the election were diminished by the presence of the other, decided to form a coalition. Eventually Moon was selected to be their candidate against Park. This would be unremarkable, if not for the fact that they ended up choosing the less popular candidate, Moon. Because they could not reach a negotiated agreement, Ahn voluntarily resigned, after expressing his unenthusiastic support for Moon.<sup>73</sup> In polls conducted where only two candidates were listed, Ahn Chul-soo was actually favored in a head-to-head election against Park Geun-hye, while in a poll pitting Park against Moon Jae-in, Moon was about seven percentage points behind in the polls.<sup>74</sup> Ultimately Park Geun-hye won 51.55% of the electorate to Moon's 48.02%.<sup>75</sup>

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<sup>71</sup> Seong Han-yong, *Moon Jae-in's Leadership in Depth*, THE HANKYOREH (Dec. 7, 2012), [http://www.hani.co.kr/arti/english\\_edition/e-national/564273.html](http://www.hani.co.kr/arti/english_edition/e-national/564273.html).

<sup>72</sup> Evan Ramstad, *Ahn Decides When He'll Decide*, THE WALL STREET JOURNAL (Sept. 11, 2012, 7:12 PM), <http://blogs.wsj.com/korearealtime/2012/09/11/ahn-decides-when-hell-decide>.

<sup>73</sup> Choe Sang-hun, *South Korea is Surprised by Departure of Candidate*, N.Y. TIMES (Nov. 23, 2012), [http://www.nytimes.com/2012/11/24/world/asia/ahn-cheol-soo-unexpectedly-quits-south-koreas-presidential-race.html?\\_r=0](http://www.nytimes.com/2012/11/24/world/asia/ahn-cheol-soo-unexpectedly-quits-south-koreas-presidential-race.html?_r=0).

<sup>74</sup> *Park Geun-hye Currently Leading Moon Jae-in In National Polls*, ROK DROP (Dec.

Park Geun-hye's father, Park Chung-hee, came into power by a military coup in May 1961, and subsequently assumed the presidency in 1963. The constitution underwent revisions under the Park regime to give him greater powers, and to allow him to be reelected beyond the constitutional term-limits.<sup>76</sup> He was subject to heavy criticism for human rights violations and his disregard of the constitutional rights and democratic ideals, and he was assassinated by Kim Jae-kyu, one of his own confidantes in 1979.<sup>77</sup>

The end of the Park Chung-hee regime was followed by another military coup in 1979. Chun Doo-hwan (1981-1988) and Roh Tae-woo (1988-1993) assumed presidency one by one after the massacre of Gwangju citizens in 1980. Chun and Roh's authoritarian regimes faced strong demand for democracy, and this procession of military regimes finally ended with the election of civilian president Kim Young-sam. Eventually, Chun Doo-hwan and Roh Tae-woo were arrested in 1995 for charges stemming from their military rebellions in 1979-80 and acts of corruption.<sup>78</sup> In March 1996 their public trial began. Chun was charged with leading an insurrection, conspiracy to commit insurrection, murder for the purpose of rebellion, and assorted crimes relating to bribery.<sup>79</sup> Roh Tae-woo was alleged to have received bribes from many corporate executives, including Kim Woochoong, chairman of Daewoo Corp, who was accused of paying Roh a total of \$31 million on seven occasions from 1988 to 1991, including a \$6.5 million bribe to win a contract to build a submarine base near the southeastern port of Busan.<sup>80</sup> Both Chun and Roh were found guilty and in

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8, 2012, 1:57 AM), <http://rokdrops.com/2012/12/08/park-geun-hye-currently-leading-moon-jae-in-in-national-polls/>; Rick Gladstone & Su-Hyun Lee, *New Voice in South Korean Politics Enters Presidential Race*, N.Y. TIMES (Sept 19, 2012), <http://www.nytimes.com/2012/09/20/world/asia/new-voice-in-south-korean-politics-enters-presidential-race.html>.

<sup>75</sup> REPUBLIC OF KOREAN CENTRAL ELECTION COMMISSION, [http://info.nec.go.kr/electioninfo/electionInfo\\_report.xhtml?electionId=0020121219&requestURI=%2Felectioninfo%2F0020121219%2Fvc%2Fvccp09.jsp&topMenuId=VC&secondMenuId=VCCP&menuId=VCCP09&statementId=VCCP09\\_%231&electionCode=1&cityCode=0&sggCityCode=0&x=31&y=7](http://info.nec.go.kr/electioninfo/electionInfo_report.xhtml?electionId=0020121219&requestURI=%2Felectioninfo%2F0020121219%2Fvc%2Fvccp09.jsp&topMenuId=VC&secondMenuId=VCCP&menuId=VCCP09&statementId=VCCP09_%231&electionCode=1&cityCode=0&sggCityCode=0&x=31&y=7) (last visited May 28, 2013).

<sup>76</sup> Donald Gregg, *Park Chung Hee*, TIME (Aug. 23, 1999), <http://www.time.com/time/world/article/0,8599,2054405,00.html>.

<sup>77</sup> Michael Breen, *Assassination of President Park Chung-Hee in 1979*, KOREAN TIMES (Oct. 24, 2010, 4:58 PM), [http://www.koreatimes.co.kr/www/news/special/2012/09/178\\_75100.html](http://www.koreatimes.co.kr/www/news/special/2012/09/178_75100.html).

<sup>78</sup> Michael Breen, *Chun Doo-hwan: Last Dictator*, KOREAN TIMES (Nov. 23, 2011, 7:26 PM), [http://www.koreatimes.co.kr/www/news/issues/2013/05/363\\_99434.html](http://www.koreatimes.co.kr/www/news/issues/2013/05/363_99434.html).

<sup>79</sup> Sheryl WuDunn, *Condemned in South Korea*, N.Y. TIMES, (Sept. 1, 1996), <http://www.nytimes.com/1996/09/01/weekinreview/condemned-in-south-korea.html>.

<sup>80</sup> Teresa Watanabe, *South Korean Ex-President Arrested: Corruption: Roe Tae Woo is Jailed on Charges of Taking More than \$300 Million*, L.A. TIMES (Nov. 17, 1995),

1997 were respectively sentenced to life imprisonment and a seventeen-year prison term.<sup>81</sup> President Kim Young-sam pardoned the prison sentences for both Chun and Roh in that same year.<sup>82</sup> Chun is still required to pay his massive fine and an additional monetary penalty related to his crimes, but he claims to have only 250,000 won (approximately \$200) to his name. To this day, the outstanding fines have not been collected.<sup>83</sup>

Along with these changes, South Korea gradually moved toward democracy and constitutionalism.<sup>84</sup> The civilian presidents Kim Young-sam (1993-1998), Kim Dae-Jung (1998-2003), and Roh Moo-Hyun (2003-2008) have each contributed to the development of a fully functioning democracy. This democratization process has also strengthened and rejuvenated the civil and political rights provisions in the constitution, and the constitution has gained greater legal authority. The overbroad and obscure human rights restricting clauses that were greatly abused under the authoritarian regimes have since been amended.<sup>85</sup>

Under the 1987 Constitution, the Constitutional Court of South Korea was established, and this court has played a significant role in consolidating democracy, human rights, and constitutionalism.<sup>86</sup> The South Korean Constitutional Court consists of nine Justices, who serve for six-year renewable terms: three of the Justices are nominated by the President, three by the National Assembly, and three by the Chief Justice of the Supreme Court.<sup>87</sup> The jurisdiction of the Constitutional Court includes: ruling on

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[http://articles.latimes.com/1995-11-17/news/mn-4124\\_1\\_roh-tae-woo](http://articles.latimes.com/1995-11-17/news/mn-4124_1_roh-tae-woo).

<sup>81</sup> See GEORGE N. KATSIAFICAS, *ASIA'S UNKNOWN UPRISINGS VOLUME 1: SOUTH KOREAN SOCIAL MOVEMENTS IN THE 20TH CENTURY* 364-65 (2012); see also Andrew Pollack, *Seoul Court Upholds Sentences on 2 Ex-Presidents*, N.Y. TIMES (April 18, 1997), <http://www.nytimes.com/1997/04/18/world/seoul-court-upholds-sentences-on-2-ex-presidents.html?ref=rohtaewoo>.

<sup>82</sup> Andrew Pollack, *2 Ex-Dictators Leave Korea Jails, Pardoned After 2 Years*, N.Y. TIMES (Dec. 23, 1997), <http://www.nytimes.com/1997/12/23/world/2-ex-dictators-leave-korea-jails-pardoned-after-2-years.html?ref=rohtaewoo>.

<sup>83</sup> KATSIAFICAS, *supra* note 81, at 364-65.

<sup>84</sup> See generally CARL J. SAXER, *FROM TRANSITION TO POWER ALTERNATION: DEMOCRACY IN SOUTH KOREA, 1987-1997* (2002).

<sup>85</sup> For example, Article 37 (2) of the 1987 Constitution was amended to reduce the restriction of constitutional rights as follows: "Freedoms and rights of citizens may be restricted by Act only when necessary for national security, maintenance of law and order or for public welfare. *Even when such restriction is imposed, essential aspects of the freedom or right shall not be violated.*" DAEHANMINKUK HUNEBOB [HUNEBOB][CONSTITUTION] art. 37(2) (S. Kor.) (emphasis added).

<sup>86</sup> See Dae-Kyu Yoon, *The Constitutional Court System of Korea: The New Road for Constitutional Adjudication*, 1 J. OF KOR. L. 1 (2001); see generally Jin-Su Yune, *Recent Decisions of the Korean Constitutional Court on Family Law*, 1 J. OF KOR. L. 133 (2001).

<sup>87</sup> Dae-Kyu Yoon, *supra* note 86, at 7.

the constitutionality of laws; ruling on competence disputes between governmental entities; giving final decisions on impeachments; making judgments on dissolution of political parties; and adjudicating constitutional petitions filed by individuals.<sup>88</sup> The Constitutional Court has been a meaningful intermediary and coordinator among different forces in Korean society by responding to the demands from social movements in the private sector, the legislative power of the National Assembly, and judiciary bodies. The Constitutional Court's decisions were considered as careful responses to the demands for social changes.<sup>89</sup>

A good example of the Court's prominent role was the impeachment proceeding concerning then-President Roh Moo-hyun in 2004.<sup>90</sup> In March 2004, the majority opposition parties (the Grand National Party ("GNP") and the New Millennium Democratic Party ("NMDP")) jointly introduced a motion for the impeachment of President Roh Moo-hyun for three charges—alleged violation of the Election Act, illegal election funds received by his staff, and jeopardizing the economy as a political move to win the imminent election.<sup>91</sup> Surprisingly, however, the impeachment bill passed (193 to 2) and the president was forced to stop his official duties while the Constitutional Court decided whether he should be removed from his public office.<sup>92</sup> While hundreds of thousands of protesters demonstrated against the illegitimate impeachment action, President Roh did not attempt to take any unusual emergency measures, and the Constitutional Court decided on May 14th, 2004, that the violations did not meet the required threshold for impeachment.<sup>93</sup> This impeachment case is a good indication that the Korean democracy is secure to the point where a coup or other illegitimate exercise of power is unlikely,<sup>94</sup> and that South Korea is now a really democratic regime.

Another prominent example of the Constitutional Court's role was shown in a lawsuit concerning discriminatory provisions in the Civil Code.<sup>95</sup> Article 809(1) of the Civil Act prohibited marriage between two persons

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<sup>88</sup> HUNBEOPJAEPANSOBEOP [Constitutional Court Act], Act. No. 105A6, Apr. 5, 2011, art. 2 (S. Kor.), available at [english.ccourt.go.kr/home/att\\_file/download/constitutional\\_court\\_act.pdf](http://english.ccourt.go.kr/home/att_file/download/constitutional_court_act.pdf).

<sup>89</sup> See Tae-Ung Baik, *Public Interest Litigation in South Korea*, in PUBLIC INTEREST LITIGATION IN ASIA 115 (Po Jen Yap & Holning Lau eds., 2011).

<sup>90</sup> *Id.* at 122-23.

<sup>91</sup> *Id.* at 122-23.

<sup>92</sup> *Id.*

<sup>93</sup> See Constitutional Court [Const. Ct.], 2004Hun-na1, May 14, 2004 (S. Kor.); see also Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from A Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403 (2005).

<sup>94</sup> Baik, *supra* note 89, at 124.

<sup>95</sup> *Id.* at 123.



having the same family name with the same ancestral line. The Seoul Family Court, after accepting the plaintiffs' complaints, suspended the case and referred the constitutionality issue to the Constitutional Court on May 29, 1995.<sup>96</sup> In a 7-2 decision, the Court held that Article 809(1) of the Civil Code was incompatible with the Constitution Article 10 right to pursue happiness, and that if the National Assembly did not amend it by December 31, 1998, it would become null and void, starting on January 1, 1999.<sup>97</sup> It took several years before the law was amended after the Court's decision. The Civil Code was finally amended on March 31, 2005 to remove the discriminatory provisions and incorporate the Constitutional Court's decision.<sup>98</sup> These developments demonstrate significant changes in South Korean society: people now try to use the Court as an institution to pursue social changes, rather than relying on demonstrations or other direct appeals to the government.<sup>99</sup>

In the same vein, regular courts are also used for public interest litigation.<sup>100</sup> For example, there was an interesting lawsuit called the "salamander lawsuit," which was filed in October 2003 by a group of plaintiffs, including the salamanders living in Mt. Cheonseong, the Buddhist nun *Jiyul*, some environmentalists, and a society called the Friends of Salamanders.<sup>101</sup> They requested that the construction of express railroad tracks by the Korea Rail Network Authority be discontinued, and invoked constitutional rights such as Article 35(1) of the Constitution on the right to environment or the right to defend nature and the provisions of relevant statutes such as the Framework Act on Environment Policy.<sup>102</sup> The court determined that the salamanders did not have standing, since nature does not have standing in a court, but the court proceeded with other plaintiffs. Eventually the case was dismissed, but the publicity from this case has greatly contributed to environmental awareness in Korea.<sup>103</sup> The public is now more accepting of the idea that the court proceedings can be a meaningful process to pursue their rights.<sup>104</sup> This is a very important shift

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<sup>96</sup> See Constitutional Court [Const. Ct.], 95Hun-ka6, July 16, 1997 (S. Kor.).

<sup>97</sup> *Id.*

<sup>98</sup> 235 votes out of 296 N.A. seats; 161 for the amendment, 58 against it, and 16 abstained from voting on March 2, 2005. Minbeob [Civil Code], Act No. 7427, Mar. 2, 2005 (S. Kor.) *Gukhoi 'Hojuje Pyeji' Minbeopgaejeongan Gagyedol [National Assembly Abolishes Head of Household System by Passing the Civil Code Amendments]*, Donga Ilbo, (Mar. 2, 2005, 5:41PM), available at <http://news.donga.com/3/all/20050302/8164924/1>.

<sup>99</sup> Baik, *supra* note 89, at 115.

<sup>100</sup> *Id.* at 125-27.

<sup>101</sup> *Id.* at 115-16.

<sup>102</sup> Supreme Court [S. Ct.], 2004Da1148 & 1149, June 2, 2006 (S. Kor.).

<sup>103</sup> See Baik, *supra* note 89, at 125.

<sup>104</sup> *Id.* at 126.

of the legal consciousness of the people because traditionally, law and legal process have not been viewed in such a positive way. There has been a lack of a law-abiding spirit and consciousness of rights in Korea,<sup>105</sup> but now Korea is achieving a smooth transition from authoritarian regimes to democracy with an increased role for the courts.<sup>106</sup>

Another important move that Korean democratic governments have taken is the promotion of transitional justice measures to correct the wrongdoings of the past.<sup>107</sup> The Korean transition from military dictatorship to democracy was not, from an international perspective, an isolated case, but Korean democratic governments were especially active in providing remedy measures to victims of past human rights violations.<sup>108</sup> As many as eighteen truth commissions have been established since 1996 to deal with the historical legacies of Korea's authoritarian and colonial past,<sup>109</sup> and the government has worked closely with civil society to provide remedial measures to these victims to achieve justice in the transition from authoritarian regimes to a democracy.<sup>110</sup>

All of these changes—democratization, the development of the rule of laws, constitutionalism and human rights protection systems—were possible because there were powerful civil society networks and combatant labor movement organizations in Korea, which demanded and supported the changes.<sup>111</sup> However, it is hard to say that Korean democratization is complete. There are still some challenges to overcome. Among others, the emergence of combatant ultra-rightist groups in society is one of the new phenomena.<sup>112</sup> Traditionally, there were government-sponsored ultra-

<sup>105</sup> Sang-Hyun Song, *Korean Attitude Toward Law*, in KOREAN LAW IN THE GLOBAL ECONOMY 129 (Sang-Hyun Song ed., 1996).

<sup>106</sup> There are still demands for a change in the strict procedural requirements in public interest litigation or the expansion of class action systems. Baik, *supra* note 91, at 126.

<sup>107</sup> For more information, see Hahm Chaihark, *Human Rights in Korea*, in HUMAN RIGHTS IN ASIA 265 (Peerenboom et. al. eds., 2006).

<sup>108</sup> Baik, *supra* note 89, at 126.

<sup>109</sup> See Byung-Wook Ahn, *Hanguk Guageo Cheongsaneui Hyeonhuanggua Guajeh* [The Present Conditions and Tasks of Past Settlement in Korea], 93 YEOKSA BIPYEONG 32, 45-46 (2010).

<sup>110</sup> See generally Kim Dong-choon & Mark Selden, *South Korea's Embattled Truth and Reconciliation Commission*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS (Mar. 1, 2010), [http://www.japanfocus.org/-kim-dong\\_choon/3313](http://www.japanfocus.org/-kim-dong_choon/3313).

<sup>111</sup> See generally Gi-Wook Shin et al., *South Korea's Democracy Movement (1970-1993): Stanford Korea Democracy Project Report (2007)*, available at [iis-db.stanford.edu/pubs/22590/kdp\\_report\\_\(final\)-1.pdf](http://iis-db.stanford.edu/pubs/22590/kdp_report_(final)-1.pdf); *Shaping Change—Strategies of Development and Transformation: South Korea*, BERTELSMANN STIFTUNG, [bti2006.bertelsmann-transformation-index.de/132.0.html?L=1](http://bti2006.bertelsmann-transformation-index.de/132.0.html?L=1) (last visited May 29, 2013) [hereinafter *Shaping Change*].

<sup>112</sup> *Shaping Change*, *supra* note 111.

conservative groups in Korea such as the Korea Freedom Federation,<sup>113</sup> Korean War Veterans Association,<sup>114</sup> and the Korean Marine Corps Veterans Association.<sup>115</sup> Their actual influence over the public was rather limited under the authoritarian regimes. However, in recent years, more aggressive activities and accusatory rhetoric such as *Bbalgaengi* (the reds) and *Jongbukseoryuk* (the pro-North Korean) are being found among the rightist or new-right groups.<sup>116</sup> The ultra-rightist conservatives have strongly expressed their animosity against the liberal movements by labeling the civil society networks as leftists.<sup>117</sup> This is worrisome because the existence of North Korea has been a constant hurdle to the full achievement of human rights protection and democracy.<sup>118</sup> The authoritarian governments justified their repressive regimes by claiming that only a strong military-style regime can fight against the threat from North Korea.<sup>119</sup> The ultra-rightist conservative rhetoric may suffocate the atmosphere of freedom of expression in Korea because the devastating effects of North Korean threats or of military tensions have never been removed. Campaigns relying on the “red complex” used by the combatant ultra-rightist conservatives could be very harmful for the development of democracy, and there is evidence that Korean National Intelligence Service agents were involved in media manipulation during the election campaign.<sup>120</sup> In this regard, one can say that democracy in South Korea is

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<sup>113</sup> The Korea Freedom Federation (*Jayuchongyeonmaeng*) was first established as Asian People's National Anti-Communist League in 1954 and has been a strong right-wing organization that supported conservatives in Korea. For more information, see its homepage, KOREA FREEDOM FEDERATION, <http://www.koreaff.or.kr/english/president.php> (last visited Aug. 2, 2013).

<sup>114</sup> See the homepage of the Korean War Veterans Association. KOREAN WAR VETERANS ASSOCIATION, <http://www.625war.or.kr/index.asp> (last visited Aug. 2, 2013).

<sup>115</sup> See the homepage of the Korean Marine Corps Veterans Association. KOREAN MARINE CORPS VETERANS ASSOCIATION, <http://rokmcva.kr/pwb/> (last visited Aug. 2, 2013).

<sup>116</sup> See Yuna Han, *The New Right: Political Winds in South Korea*, 29 HARVARD INTERNATIONAL REVIEW No.1 (2007).

<sup>117</sup> Michael Richardson, *Civil Society and the State in South Korea*, in 2010 SAIS U.S.-KOREA YEARBOOK 165, 166-68 (2010), available at [uskoreainstitute.org/wp-content/uploads/2010/05/YB07-chapter13.pdf](http://uskoreainstitute.org/wp-content/uploads/2010/05/YB07-chapter13.pdf).

<sup>118</sup> Many of the human rights violations in South Korea took place under the name of national security, and the National Security Act is still not repealed because of that reason. See generally, Diane Draft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 WIS. INT'L L. J. 627 (2012).

<sup>119</sup> See generally Tae-Ung Baik, *Justice Incomplete: The Remedy for the Victims of Jeju April Third Incident*, in RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE IN REGIONAL PERSPECTIVE (Shin et al eds., 2007).

<sup>120</sup> See Choe Sang-Hun, *South Korean Intelligence Officers Are Accused of Political*

still in the process of growing. The struggle between the conservatives who support authoritarian regimes and the liberals or progressives who want to move ahead to achieve the consolidation of democracy and sound human rights systems is not over yet.

#### IV. DEMANDS OF ECONOMIC DEMOCRACY

One of the most hotly debated issues during the Presidential election in 2012 was how to achieve economic democracy in South Korea.<sup>121</sup> The ruling party leader Park Geun-hye as well as the opposition candidates were in agreement that the demand for economic democracy should be considered seriously as a main point of their campaigns. However, their actual policy to achieve the economic democracy was not the same. For example, Park only emphasized fair competition and strict implementation of law, while opposition party leaders were more decisively demanding the revival of a 30% cap on the maximum amounts of investments made from companies to their subsidiary companies.<sup>122</sup> The opposition party also demanded a ban on circular investment and a measure to cut off the ties between financial institutions and corporations.<sup>123</sup> Even after the election, Park Geun-hye is still indicating that she supports the economic democracy, but she is now merging it with the new catchphrase "creative economy."<sup>124</sup> In fact these policy debates reflect the public sentiments concerning *chaebols* (big conglomerates) in South Korea.

Back in 1960, South Korea was one of Asia's poorest countries, with a Gross National Income ("GNI") per capita of \$79.<sup>125</sup> It has since grown to be the world's 10th largest trading country with a GDP per capita of \$30,800.<sup>126</sup> The South Korean economic miracle cannot be explained without mentioning the growth of Korean *chaebols*. In Korea, *chaebols* are

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*Meddling*, N.Y. TIMES (Apr 18, 2013), <http://www.nytimes.com/2013/04/19/world/asia/south-korean-intelligence-officers-are-accused-of-political-meddling.html>.

<sup>121</sup> See *Park Geun-hye's Economic Democracy Pledge Focused on Fair Market Competition*, YONHAP NEWS AGENCY (Nov 16, 2012, 12:03 PM), <http://english.yonhapnews.co.kr/national/2012/11/16/98/0301000000AEN20121116004600315F.HTML>.

<sup>122</sup> Tae-Hee Lee, *A Comparison of Economic Democracy Policy of Saenuri Party and Democratic Party*, THE HANKYOREH (Mar. 20, 2012 8:44 PM), [http://www.hani.co.kr/arti/politics/politics\\_general/524374.html](http://www.hani.co.kr/arti/politics/politics_general/524374.html).

<sup>123</sup> *Id.*

<sup>124</sup> Ahn Seon-hee, *New President Park outlines Geun-hye-nomics*, THE HANKYOREH (Feb 26, 2013, 3:25 PM), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/575571.html](http://www.hani.co.kr/arti/english_edition/e_national/575571.html).

<sup>125</sup> YOUNG-IOB CHUNG, *SOUTH KOREA IN THE FAST LANE: ECONOMIC DEVELOPMENT AND CAPITAL FORMATION* 13 (2007).

<sup>126</sup> South Korea, CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html> (last visited May 29, 2013) (2010 estimate in 2012 dollars).

the whole business group as a unit consisting of a number of widely diversified and legally independent affiliates, all of which are controlled by a controlling shareholder, usually the founder or his heirs, and his family members.<sup>127</sup> For example, Samsung, Hyundai, and LG are the names of a group of companies that have greatly diversified companies under their wings.<sup>128</sup>

Korean corporations, especially *chaebols* have emerged out of favorable conditions implemented by the government regarding capital accumulation, financing, market management, currency control, and labor market management, including the suppression of trade union movements.<sup>129</sup> This state-sponsored growth also facilitated corruption and lack of proper corporate governance; corporate money was often used to sponsor politics with illegal political funds and bribery.<sup>130</sup> It was publicly known that *chaebols* could get away with tax evasion and violations of fair competition laws.<sup>131</sup> In this regard, the Korean *chaebol* structure was criticized as being among “the least investor-protective corporate systems in the world.”<sup>132</sup>

When South Korea was experiencing currency shortages during the financial crisis in 1997-98, people rushed to donate their gold rings and jewelry to the government to help the country overcome the crisis.<sup>133</sup> Housewives gave up their wedding rings; athletes donated medals and trophies; and many gave away “gold luck keys,” a traditional present on the opening of a new business or a 60th birthday.<sup>134</sup> With this support, the government initiated broad reform measures to improve corporate governance.<sup>135</sup>

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<sup>127</sup> Ok-Rial Song, *The Legacy of Controlling Minority Structure: A Kaleidoscope of Corporate Governance Reform in Korean Chaebol*, 34 LAW & POL’Y INT’L BUS. 183, 184-86 (2002).

<sup>128</sup> See generally Jiho Jang, *The State Activism Toward the Big Business in Korea, 1998-2000: Path dependence and Institutional Embeddedness*, UNIVERSITY OF MISSOURI-COLUMBIA n.1 (2001), available at [http://www2.law.columbia.edu/course\\_00S\\_L9436\\_001/2005/pp010423.pdf](http://www2.law.columbia.edu/course_00S_L9436_001/2005/pp010423.pdf) (paper prepared for delivery at the 2001 Annual Meeting of Midwest Political Science Association, Chicago, April 19-22, 2001).

<sup>129</sup> See Andrei Shleifer and Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 737-44 (1997).

<sup>130</sup> *Id.* at 742-45.

<sup>131</sup> *Id.* at 742.

<sup>132</sup> Song, *supra* note 127, at 183.

<sup>133</sup> *Koreans give up their gold to help their country*, BBC, (Jan. 14, 1998, 6:26 PM), <http://news.bbc.co.uk/2/hi/world/analysis/47496.stm>.

<sup>134</sup> *Id.*

<sup>135</sup> Song, *supra* note 127, at 220-26 (discussing corporate governance reforms); BAIK, *supra* note 10, at 122-23 (discussing legislative reform recognizing human rights).

After a decade, however, the public sentiment in Korea has shifted again.<sup>136</sup> South Koreans started to complain that the reform efforts following IMF-guidelines have failed to achieve the promised transparency and global standards.<sup>137</sup> The reform measures ended up strengthening a small number of *chaebols*, providing them increasingly greater benefits based on their close relationship with the government, while the public was left frustrated by the bipolarization of the industry and the unequal distribution of economic opportunity and benefits.<sup>138</sup> The younger generation has expressed its strong discontent, stemming from the scarcity of jobs and an unclear future.

Korea's economic success could be viewed in two different dimensions. On the one hand, it was a real economic miracle: the South Korean government even coined the term, "The Miracle on the Han River," which was named after "The Miracle on the Rhine."<sup>139</sup> Under the strong leaderships of Park Chung-hee and his successors, Korea achieved rapid economic development, while maintaining security and stability against the constant threat from North Korea.<sup>140</sup> On the other hand, the miracle was a result of the sacrifice of workers, who worked long-hours with low wages. The industrial injuries of workers were often overlooked and the distribution of the fruits of the growth was not done equally.<sup>141</sup> The dominant slogans of national security and economic developmentalism were used to justify the authoritarian regimes.<sup>142</sup>

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<sup>136</sup> See generally Bruce Klingner & Anthony B. Kim, *Economic Lethargy: South Korea Needs a Second Wave of Reforms*, HERITAGE FOUND. (Dec. 7, 2007), <http://www.heritage.org/research/reports/2007/12/economic-lethargy-south-korea-needs-a-second-wave-of-reforms>.

<sup>137</sup> See Gill-Chin Lim, *South Korea, Brazil and the IMF: Coping with Financial Crisis*, CENTRE FOR WORLD DIALOGUE (Summer 1999), <http://www.worlddialogue.org/content.php?id=18>.

<sup>138</sup> Lee Joo-hee, 'Economic Democratisation' buzzword of S. Korean Presidential Race, ASIA ONE (July 6, 2012), <http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120706-357497.html>.

<sup>139</sup> EUN MEE, KIM, BIG BUSINESS, STRONG STATE: COLLUSION AND CONFLICT IN SOUTH KOREAN DEVELOPMENT 2 (1997).

<sup>140</sup> See generally William H. Overholzf, *Park Chung Hee's International Legacy*, HARVARD KENNEDY SCHOOL ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION (2011), <http://www.ash.harvard.edu/extension/ash/docs/parkjunghee.pdf>.

<sup>141</sup> See generally Hyun-Hoon Lee, *Growth Policy and Inequality in Developing Asia: Lesson from Korea*, ECONOMIC RESEARCH INSTITUTE FOR ASEAN AND EAST ASIA (2012), available at <http://www.eria.org/ERIA-DP-2012-12.pdf>.

<sup>142</sup> See MI PARK, DEMOCRACY AND SOCIAL CHANGE: A HISTORY OF SOUTH KOREAN STUDENT MOVEMENTS, 1980-2000 61-62 (2008).

As the dissatisfaction of the public grew, Article 119 of the Korean Constitution was often cited as a reference point to support the validity of the claims. Article 119 states:

(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the [national] economy through harmony among the economic agents.<sup>143</sup>

In other words, under this constitutional provision, the government is obligated to pursue economic democracy. From this point of view, Korean *chaebols* are again facing demands for change.

Korea is one of the most *chaebol*-driven economies. Currently the total assets of thirty *chaebols* amount to 52% of total assets in the national economy,<sup>144</sup> and Samsung's sales accounted for more than 20% of South Korea's GDP in 2011.<sup>145</sup> The controlling minority ownership structure of *chaebols* have been widely criticized due to the lack of corporate governance and transparency in the process of centralized management, diversified businesses, and internal capital markets operations.<sup>146</sup> Cross-shareholding among branch companies is prohibited after the 1997-98 financial crisis, but circular-shareholdings is still allowed, which is one of the greatest issues of concern.<sup>147</sup> President Kim Dae-jung tried to respond to the financial crisis with some forms of *chaebol* reform.<sup>148</sup> On the one hand, he strongly reassured a system of market economy, the opening-up of Korean markets, and the protection of foreign investment.<sup>149</sup> On the other hand, he initiated *chaebol* reengineering drives. He met with the Hyundai, Samsung, LG, and SK chairpersons on Jan. 3, 1998, and got them to agree

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<sup>143</sup> DAEHANMINKUK HUNBEOP [HUNBEOP][CONSTITUTION] art. 119 (S. Kor.) (emphasis added).

<sup>144</sup> See OECD, CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE 171 (2001).

<sup>145</sup> TONY MICHELL, SAMSUNG ELECTRONICS AND THE STRUGGLE FOR LEADERSHIP OF THE ELECTRONICS INDUSTRY 65 (2010).

<sup>146</sup> Song, *supra* note 127, at 198.

<sup>147</sup> *Id.* at 198-201.

<sup>148</sup> See generally SOOK JONG LEE, THE POLITICS OF CHAEBOL REFORM IN KOREA: SOCIAL CLEAVAGE AND NEW FINANCIAL RULES, 38 J. CONTEMP. ASIA 439 (2008), available at <http://content.csbs.utah.edu/~mli/Economies%205430-6430/Lee-The%20Politics%20of%20Chaebol%20Reform%20in%20South%20Korea.pdf>.

<sup>149</sup> *Id.* at 441-50.

to the adoption of a system of combined financial statements, a prohibition of cross-guaranteeing among branch corporations, and pledges of investments from the owner's personal assets.<sup>150</sup> He demanded so-called "big deals" and restructuring to enhance the efficiency of the *chaebols'* economy, and facilitated the reengineering of 106 companies during 1998-2000.<sup>151</sup> However, this process was also criticized, in that it has increased the *chaebols'* moral hazard because Kim helped shaky corporations with governmental support.<sup>152</sup> For example, to bailout Daewoo group, the government is believed to have spent more than \$100 billion USD of tax money.<sup>153</sup> In addition, to help with the restructuring, summary firing of workers was conducted under governmental auspices, and the newly adopted American-style flexible labor market system greatly weakened the labor power.

Some NGOs, such as PSPD, campaigned for shareholder activism in Korea by advocating for the participation of organized minority shareholders in the corporate decision-making process by attending shareholders' meetings, submitting shareholder proposals, convening extraordinary shareholders' meetings, inspecting books and records, filing injunctions to prevent illegal acts of management, and filing shareholder derivative actions or criminal or administrative complaints.<sup>154</sup> The campaign for corporate governance reform in Korea had unique meaning because it was viewed as part of the social movements to achieve economic justice. The government had backed up this movement to enhance the quality of corporate governance by amending the Commercial Act, the Securities and Exchange Act, the Securities-related Class Action Act, and the Monopoly Regulation and Fair Trade Act. Some reform measures such as mandatory hiring of outside directors, permittance of cumulative voting, and class actions in securities litigation had taken place as part of these moves.<sup>155</sup> However, the protection of minority shareholders' interests and

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<sup>150</sup> Jang, *supra* note 128, at 4.

<sup>151</sup> *Id.*

<sup>152</sup> See, e.g., Charles W. L. Hill, *The Asian Financial Crises*, BLOG OF PROF. TRAN HUU DUNG, <http://www.wright.edu/~tdung/asiancrisis-hill.htm> (last visited May 30, 2013).

<sup>153</sup> Hyunwoo Goo, *Segyehwa, Sinjayujueui, geurigo Jedoronjeok Hameui: Kim Daejung Jeongbueui Gyeongjegaehyukeul Jungsimeuro* [Globalization, Neo-liberalism, and the Institutional Implication: with a Focus on Economic Reform under the Kim Daejung Government], 6 GUKJEONGUANRI YEONGU 33, 48 (2011).

<sup>154</sup> Jooyoung Kim & Toongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1 J. KOREAN L. 51, 54-55 (2001).

<sup>155</sup> Song, *supra* note 127, at 186.



promotion of the roles of shareholder deliberative actions did not sufficiently change the corporate governance practice.<sup>156</sup>

In fact, the governmental policy toward *chaebols* was not very consistent. When Hyundai Motor Group Chairman Chung Mong-koo was convicted and sentenced to three years imprisonment on charges of embezzlement of company funds and bribery of government officials in 2007, President Lee Myong-bak granted him a presidential pardon in 2008, citing the chairman's important role in the South Korean economy.<sup>157</sup> Similarly, when Lee Kun-hee, the current Samsung chairman, was sentenced by the Korean Supreme Court to a suspended three-year prison sentence for evading tens of millions of dollars in taxes and embezzling corporate money in 2009, President Lee Myong-bak again granted a special amnesty for him so that the businessman could retain his membership in the International Olympic Committee (IOC), leading the campaign for the South Korean city of *Pyeongchang* to host the 2018 Winter Olympics.<sup>158</sup>

Park Geun-hye and her ruling *Saenuri* Party has vowed to pursue economic democracy by adopting some policy measures, but they refused to restrict the pre-existing circular investment.<sup>159</sup> It is not clear at all whether the impunity of the owners of the corporations and *chaebols* for their illegal acts will end during Park's presidency.

#### V. SOUTH KOREA'S DEATH PENALTY MORATORIUM

South Korea had been a death penalty retentionist state since its establishment but it is now considered abolitionist in practice.<sup>160</sup> The death penalty sentence has often been misused to punish political opponents of the regimes. For example, Jo Bong-am was arrested for plotting a rebellion against the country by forming a progressive party in 1958, and, based on the Syngman Rhee administration's fabricated espionage charges, he was

<sup>156</sup> *Id.* at 221-22.

<sup>157</sup> *S. Korea Grants Amnesty for Convicted Tycoons*, AGENCY FRANCE-PRESSE-INDUSTRY WEEK (Aug. 12, 2008), <http://www.industryweek.com/regulations/south-korea-grants-amnesty-convicted-tycoons>.

<sup>158</sup> Choe Sang-hun, *Korean Leader Pardons Samsung's Ex-Chairman*, N.Y. TIMES (Dec. 29, 2009), [http://www.nytimes.com/2009/12/30/business/global/30samsung.html?\\_r=0](http://www.nytimes.com/2009/12/30/business/global/30samsung.html?_r=0).

<sup>159</sup> Ryu Yi-geun, *Park Geon-hye Watering Down Economic Democracy Pledges*, THE HANKYOREH (Nov. 17, 2012, 3:49 PM), [http://www.hani.co.kr/arti/english\\_edition/e\\_national/561085.html](http://www.hani.co.kr/arti/english_edition/e_national/561085.html).

<sup>160</sup> See Kuk Cho, *Death Penalty in Korea: From Unofficial Moratorium to Abolition?*, 3 ASIAN J. COMP. L. 1 (2008). See also *Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited May 29, 2013).

sentenced to death and was subsequently executed.<sup>161</sup> His case was finally retried by the Supreme Court of Korea in 2011, and he was found not guilty.<sup>162</sup> *Inhyukdang*, or the People's Revolutionary Party Incident is another notorious case, where eight people were sentenced to death under the Park Chung-hee government on April 8th, 1975 and they were executed eighteen hours after sentencing. The Supreme Court retried the case in 2007 and found them not guilty.<sup>163</sup> Korea has executed a total of 998 convicts since its national liberation in 1945, and the last execution of twenty-three convicts happened in 1997.<sup>164</sup> After President Kim Dae-Jung took office in 1998, South Korea's moratorium on executions began, and no execution has happened since then. As of July 1, 2012, fifty-eight prisoners are on death row, all of whom are males convicted of murder.<sup>165</sup>

The death penalty is widely supported by a majority of Asian countries.<sup>166</sup> For example, Singapore has the highest per capita execution rate in the world, and imposes a mandatory death penalty for murder and a range of drugs and firearms offenses, and it asserts that capital punishment is not a human rights issue.<sup>167</sup> Malaysia retains the death penalty and imposes the mandatory death penalty for drug trafficking.<sup>168</sup> The Indian Court upheld the constitutionality of the death penalty on the condition that it is applied only to the "rarest of rare cases,"<sup>169</sup> and the Japanese also

<sup>161</sup> Andrei Lankov, *Tragic End of Communist-Turned-Politician Cho Bong-am*, The Korean Times (Jan. 9, 2011), [http://koreatimes.co.kr/www/news/nation/2011/01/116\\_79367.html](http://koreatimes.co.kr/www/news/nation/2011/01/116_79367.html).

<sup>162</sup> Supreme Court [S. Ct.], 08jaedo11, Jan. 20, 2011 (S. Kor.); see also Park Si-soo, *Cho Bong-am case reopened after 51 years*, KOREA TIMES (Nov. 19, 2010), [http://www.koreatimes.co.kr/www/news/nation/2010/11/113\\_76660.html](http://www.koreatimes.co.kr/www/news/nation/2010/11/113_76660.html).

<sup>163</sup> *Families of Eight Wrongfully Executed South Korean Political Prisoners Awarded Record Compensation*, THE HANKYOREH (Aug. 22, 2007), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/230608.html](http://english.hani.co.kr/arti/english_edition/e_national/230608.html).

<sup>164</sup> Cho, *supra* note 160, at 17.

<sup>165</sup> See Ministry of Justice, Republic of Korea, *80 nyeondo ihu Sahyeongsu Hwakjeong deung Jaryo*, [Data on Death Penalty after 1980s], July 1, 2012, available at [https://www.moj.go.kr/HP/COM/bbs\\_03/ListShowData.do?strNbodCd=noti0009&strWrtNo=1654&strAnsNo=A&strRtnURL=MOJ\\_10301030&strOrgGbnCd=100000](https://www.moj.go.kr/HP/COM/bbs_03/ListShowData.do?strNbodCd=noti0009&strWrtNo=1654&strAnsNo=A&strRtnURL=MOJ_10301030&strOrgGbnCd=100000) (last visited May 29, 2013); see also Kuk Cho, *Death Penalty Lessons from Korea: Gradual Move from Moratorium to Abolition*, available at [http://www.euji-waseda.jp/common/pdf/Prof.\\_Cho.pdf](http://www.euji-waseda.jp/common/pdf/Prof._Cho.pdf) (last visited May 29, 2013).

<sup>166</sup> *The Death Penalty in 2012*, AMNESTY INTERNATIONAL (last visited May 29, 2013), <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2012>.

<sup>167</sup> Cho, *supra* note 160, at 7.

<sup>168</sup> *Id.* at 7-8; see also Malaysia, DEATH PENALTY WORLDWIDE (last visited May 29, 2013), <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malaysia> (citing Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980).

<sup>169</sup> *Id.* at 8; see also India Has 477 People on Death Row, BBC (Dec. 13, 2012), <http://www.bbc.co.uk/news/world-asia-india-20708007>.

impose death sentences in cases of murder.<sup>170</sup> China's death-eligible offences include a wide range of economic crimes such as corruption and the theft of antiquities.<sup>171</sup> Although China limits the death penalty to extremely serious crimes<sup>172</sup> and it is not to be applied to juveniles,<sup>173</sup> China's death penalty practice has been internationally criticized.<sup>174</sup> Amnesty International recorded 4,000 death sentences, and 2,500 executions in China in 2001.<sup>175</sup> According to Amnesty International, the confirmed numbers of execution in 2007 was 470,<sup>176</sup> 1,010 in 2006,<sup>177</sup> and 1,770 in 2005,<sup>178</sup> which ranked number one in the world.

The Universal Declaration on Human Rights is not clear in its death penalty norm. Article 3 provides the right to life, but there is no expression concerning the death penalty.<sup>179</sup> Article 5 provides the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>180</sup> ICCPR on the other hand, provides in Article 6(1) that no one shall be arbitrarily deprived of his life.<sup>181</sup> It further states in Article 6(2): "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . ."<sup>182</sup> The

<sup>170</sup> *Id.* at 9; see also Kawai Mikio, *The Death Penalty in Japan: How Genuine is Public Support*, NIPPON.COM (March 13, 2012), [http://www.nippon.com/en/currents/d00025/#auth\\_profile\\_0](http://www.nippon.com/en/currents/d00025/#auth_profile_0).

<sup>171</sup> David Lague, *China Acts to Reduce High Rate of Executions*, N.Y. TIMES (Nov. 1, 2006), <http://www.nytimes.com/2006/11/01/world/asia/01china.html>; see also Calum MacLeod, *Tomb Raiders Unearth New Marketplace* (June 23, 2010 7:02 PM), [http://usatoday30.usatoday.com/news/world/2010-06-23-tomb-raiders-china\\_N.htm?csp=webslice](http://usatoday30.usatoday.com/news/world/2010-06-23-tomb-raiders-china_N.htm?csp=webslice).

<sup>172</sup> Criminal Law of the People's Republic of China, RefWorld (last visited May 29, 2013), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b5cd2> (art. 48).

<sup>173</sup> *Id.* art 49.

<sup>174</sup> Lague, *supra* note 171.

<sup>175</sup> *China Questions Death Penalty*, PEOPLE'S DAILY ONLINE (Jan. 27, 2005, 3:04 PM), [http://english.peopledaily.com.cn/200501/27/eng20050127\\_172139.html](http://english.peopledaily.com.cn/200501/27/eng20050127_172139.html).

<sup>176</sup> *Death Sentences and Executions in 2007*, AMNESTY INTERNATIONAL (last visited May 29, 2013), <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2007>.

<sup>177</sup> *Death Sentences and Executions in 2006*, AMNESTY INTERNATIONAL (last visited May 29, 2013), <http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2006>.

<sup>178</sup> *Death Sentences and Executions in 2005*, AMNESTY INTERNATIONAL (last visited May 29, 2013), <http://www.amnesty.org/en/library/asset/ACT50/002/2006/en/48b12000-d451-11dd-8743-d305bea2b2c7/act500022006en.html>.

<sup>179</sup> UDHR, *supra* note 25, art. 3.

<sup>180</sup> *Id.* art. 5.

<sup>181</sup> ICCPR, *supra* note 12, art. 6(1).

<sup>182</sup> *Id.* art. 6(2).

main restriction on the death penalty is to limit the penalty to the most serious crimes.<sup>183</sup> Under Article 6(5), the sentence of death is prohibited against persons below eighteen years of age and pregnant women.<sup>184</sup> That is why the world has adopted the Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty in 1989, which went into effect in 1991.<sup>185</sup> The European Convention on Human Rights (ECHR) has had similar developments. Article 2.1 initially provided the right to life.<sup>186</sup> The Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty was signed in 1983 to abolish the death penalty, but it did not exclude the death penalty in respect to acts committed in time of war or of imminent threat of war.<sup>187</sup> Protocol No. 13 to the ECHR Concerning the Abolition of the Death Penalty in All Circumstances was finally adopted in 2002 to strengthen this move of abolishing the death penalty,<sup>188</sup> and no European states are currently using the death penalty, which means that death penalty abolition is now a regional customary norm in Europe.<sup>189</sup>

South Korea has been moving faster than many other Asian states in its restriction of the usage of death penalty, but it is still behind the level of normative development in Europe. Although Korea has placed a moratorium on executions, great numbers of crimes are still punishable by death.<sup>190</sup> Additionally, the Korean Supreme Court and Constitutional Court support the death penalty.<sup>191</sup> The Supreme Court considers the death

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* art. 6(5).

<sup>185</sup> See *supra* note 42.

<sup>186</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 2.1, Nov. 4, 1950, E.T.S. No. 5.

<sup>187</sup> Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, Apr. 28, 1983, E.T.S. 114.

<sup>188</sup> Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, May 3, 2002, E.T.S. 187.

<sup>189</sup> Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. No. 993 (June 26, 1945) [hereinafter *ICJ Statute*].

<sup>190</sup> Currently, the Republic of Korea's Criminal Code punishes eighteen crimes by death: Articles 87 (insurrection), 92 (Inducement of Foreign Aggression), 93 (Taking Side with Enemy), 94 (Benefiting Enemy by Levying Soldiers), 95 (Benefiting Enemy by Providing Equipment), 96 (Benefiting Enemy by Destroying Equipment), 98 (Spying), 119 (Use of Explosives), 144 (Special Obstruction of Public Duty), 163 (Obstruction of Inquest over Unnatural Corpse), 164 (Setting Fire to Present Living Building, etc.), 172 (Burst of Explosive Object), 173 (Obstruction to Supply of Gas, Electricity, etc.), 177 (Inundation of Present Living Building, etc. with Water), 250 (Murder, Killing Ascendant), 324-4 (Murder of Hostage, etc.), 338 (Murder, etc. by Robbery), and 340 (Piracy).

<sup>191</sup> *South Korea Court Rules Death Penalty Legal*, BBC (Feb. 25, 2010, 12:43 PM),

penalty constitutional as “an extremely exceptional punishment.”<sup>192</sup> The Constitutional Court has also considered the constitutionality of the death penalty twice: the first was in 1996 and the second was in 2010.<sup>193</sup> It also found that the death penalty was constitutional. The majority reasons that—“the death penalty is intended to serve several legislative purposes including crime deterrence by making a psychological threat on the people, bringing justice through a fair retribution against the criminals, and protecting society by permanently blocking recidivism of the criminals,” and that “these legislative purposes are legitimate and the death penalty is a proper means to achieve the purposes.”<sup>194</sup> Four dissenting judges contend that the death penalty violates Article 37 Section 2 of the Constitution by infringing on the essential aspect of the right to life without any legitimate reason<sup>195</sup> and “contradicts with human dignity and worth enumerated by Article 10 of the Constitution.”<sup>196</sup> A positive change is that majority support for the death penalty has decreased from seven of nine in favor of the death penalty in 1996, to five of nine in 2010.<sup>197</sup>

Although the death penalty has not been removed, there has been some improvement concerning the practice of death penalty norms in Korea. For example, Article 13 of the National Security Act, a provision that allows the death penalty to punish repeated crimes of Article 7(1) and (5) (enemy-benefitting activities) was found unconstitutional by the Constitutional Court in 2002<sup>198</sup> and Article 11(1) of the Act for Aggravated Punishments for Specific Crimes was found unconstitutional by the Constitutional Court in 2003.<sup>199</sup> Moreover, there have been continuous attempts to abolish the

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<http://news.bbc.co.uk/2/hi/asia-pacific/8536355.stm>.

<sup>192</sup> Supreme Court [S. Ct.], 85Do926, June 11, 1985 (S. Kor.); Supreme Court [S. Ct.], 87Do1240, Oct. 13, 1987, (S. Kor.); Supreme Court [S. Ct.], 92Do1086, Aug. 14, 1992, (S. Kor.); Supreme Court [S. Ct.], 94Do2662 Jan. 13, 1995, (S. Kor.); see Cho, *supra* note 162 at 16.

<sup>193</sup> Constitutional Court [Const. Ct.], 1995Hun-Bal, Nov. 28, 1996 (S. Kor.), Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.); see also *Constitutional Court Upholds Death Penalty*, THE CHOSUN ILBO (Feb. 26, 2010, 11:55 PM), [http://english.chosun.com/site/data/html\\_dir/2010/02/26/2010022600912.html](http://english.chosun.com/site/data/html_dir/2010/02/26/2010022600912.html).

<sup>194</sup> Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

<sup>195</sup> See Judge Dae-hyeon Cho's dissenting opinion, Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

<sup>196</sup> See Judge Hee-ok Kim's dissenting opinion, Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

<sup>197</sup> Supreme Court [S. Ct.], 85Do926, June 11, 1985 (S. Kor.); Supreme Court [S. Ct.], 87Do1240, Oct. 13, 1987, (S. Kor.); Supreme Court [S. Ct.], 92Do1086, Aug. 14, 1992, (S. Kor.); Supreme Court [S. Ct.], 94Do2662 Jan. 13, 1995, (S. Kor.).

<sup>198</sup> Constitutional Court [Const. Ct.], 2002Hun-Ka5, Nov. 28, 2002 (S. Kor.); see Cho, *supra* note 160, at 21.

<sup>199</sup> Constitutional Court [Const. Ct.], 2002Hun-Ba24, Nov. 27, 2003 (S. Kor.); see Cho,

death penalty. For instance, a great number of National Assembly members tried to abolish the penalty, and five bills have been submitted for this purpose: 90 members (1999), 92 members (2001), 175 out of 273 total members (2004), 39 members (2008), 53 members (2009) respectively supported the bills to abolish the death penalty by replacing it with life imprisonment, but none of them passed the National Assembly.<sup>200</sup> In addition the National Human Rights Commission presented its opinion on April 6, 2005 that the death penalty should be abolished,<sup>201</sup> and the Catholic Church also continues to campaign against the death penalty.<sup>202</sup>

Unfortunately, however, the prospects for a complete abolishment of the death penalty are not very bright at this time. According to a poll, 69.6% of the public still supports the death penalty<sup>203</sup> and the new president Park Geun-hye is a retentionist.<sup>204</sup> The death penalty moratorium was a great development in the process of domesticating international human rights standards on Korea, but it still needs time to achieve a higher normative protection of human rights under the Korean norm filtering system. Continuous and vigorous efforts will be needed to achieve full abolition of the death penalty.

## VI. CONCLUSION

South Korea has developed its mechanisms of politics, constitutional jurisprudence and human rights according to its own historical path. It was indeed a miraculous process of development. South Korea can claim to have met international standards for the most part and may be proud of its achievements. The positive changes accomplished in Korea, however, are not free from problems and flaws. The current status of normative development for democracy and human rights protection reflects its domestic political changes and norm filtering mechanisms.

The recent changes after the election process remind us of many projects yet to be completed in the areas of political democracy, economic

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*supra* note 162, at 21.

<sup>200</sup> See Cho, *supra* note 160, at 23.

<sup>201</sup> *Id.* at 24-5.

<sup>202</sup> SANGMIN BAE, WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT 74 (2007).

<sup>203</sup> See, Soon-cheol Kwon, *Sahyeongje Jonsok Chanseong, 30dae Bumo Gajang Noppa* [Highest Death Penalty Retention Supports Come from the Parents in their Thirties], 995 Magazine Kyunghyang Weekly (Oct. 9, 2012), <http://newsmaker.khan.co.kr/khnm.html?mode=view&code=113&artid=201209251353171&pt=nv>.

<sup>204</sup> Myo-ja Ser, *Debate Over Death Penalty Reignited*, KOREA JOONGANG DAILY (Sep. 12, 2012), <http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2959321&cloc=rss%7Cnews%7Cjoongangdaily>.

democracy and further protection of human rights. South Korea still has miles to go to consolidate its democracy and human rights systems. This change will not be given for free. To achieve this goal, more efforts from various stakeholders in South Korean society should be exerted.

